

Memorandum

To: Legislative Leadership and the Code Commissioner
From: Commissioner Mangan
In Re: 2019-CRL-004A, COPP Jurisdiction and Legislative Act
Leadership Montana Legislative Retreat Proposal
Date: September 27, 2019

Commissioner's Jurisdictional Grant

In determining who had jurisdiction over potential violations of the Code of Ethics the legislature provided that an ethics complaint would be filed with the Commissioner for "state officers, legislators, and state employees", Mont. Code Ann. § 2-2-136(1). The only exclusion to the Commissioner's jurisdiction was when a complaint against a legislator which involved a "legislative act", *id.* This portion of the statute was enacted at the same time that Mont. Code Ann. § 2-2-135 was (Senate Bill 136, 1995 Legislature). Where there is a broad grant of authority along with a specific grant of authority, the more specific grant prevails, Mont. Code Ann. § 1-2-102, *Ditton v. DOJ Motor Vehicle Div.*, 2014 MT 54 ¶22. Here, the legislature retained jurisdiction over complaints involved a "legislative act". Jurisdiction "for all other acts" is with the Commissioner, Mont. Code Ann. § 2-2-103(4)(a)(ii).

This interpretation is also consistent with legislative history. Free. Conf. Comm., *Apr. 11, 1995 Hearing on SB 136*, 54th Mont. Leg (1995) (Leg. Minutes)(Exhibit A). While discussing the jurisdiction for complaints regarding legislators, Rep. Denny stated that "the public concern stemmed from a belief that legislators are burying ethics problems in Ethics Committees and there was never any resolution to the problems", *id.* p. 7. The Committee acknowledged that the Code of Ethics would be providing expanded jurisdiction to the Commissioner over legislators, and that they would be subject to the "same civil penalties and procedures for complaints in front of Commissioner Argenbright that other state officers were subject to", *id.* All complaints could be filed with the Commissioner and, according to Mr. Petesch, then legislative counsel, "the Commissioner could determine whether or not a legislative act was involved", *id.* pg 9. With that understanding, the motion passed in committee and both houses and became law. The carve out to "exclude legislative acts from the delegation of authority" to COPP was aimed in no small part at "protect[ing] the constitutional

immunity” afforded to Legislators by the speech and debate clause of Article V, § 8 of the Montana Constitution. *Id.*, at pg. 9.

Legislative Act

The Commissioner respectfully disagrees with Mr. Evert’s interpretation that a “legislative act” is involved in the proposed educational activity. According to that opinion and the information provided to Mr. Evert “neither Leadership Montana nor AMB West Philanthropies have, nor will have, official business proposed before the Montana Legislature”. The Code of Ethics defines an “official act” as “a vote, decision, recommendation, approval, disapproval, or other action, including inaction, that involves the use of discretionary authority”, Mont. Code Ann. § 2-2-102(5). A reasonable interpretation of a “legislative act” is an “official act” of the Legislature and would include the drafting and introduction of legislation, committee work, speech and debate, and votes on matters before the Legislature.

As applied to legislators “official action” is mentioned in two statutes in the Code of Ethics, Mont. Code Ann. §§ 2-2-104(1)(b)(ii) and 2-2-112(3). In order for a legislator to be able to take “official action” there must be “legislative matter” before the legislature, *i.e.* pending or future state legislation. Based on the facts provided to Mr. Evert there is no legislative matter pending, nor did he believe there likely would be one presented to the legislature in the reasonable future. In the Commissioner’s opinion, without a pending or future legislative matter the act of attending this conference is not a “legislative act” but rather is among “all other acts” of Legislators for which the enforcement of the Code of Ethics has been assigned to the Commissioner, not the Legislature’s ethics committees.